NOVA SCOTIA PROVINCIAL JUDGES' SALARIES AND BENEFITS TRIBUNAL
(2004-2007)

REPORT AND RECOMMENDATIONS FOR THE PERIOD
APRIL 1, 2005 TO MARCH 31, 2008

Tribunal Members

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Halifax, Nova Scotia

INTRODUCTION

1. This is the Report of the 2004-2007 Tribunal for Determination of the Salaries and Benefits for Provincial Court and Family Court Judges of the Province of Nova Scotia. The Tribunal was established on December 10, 2004 pursuant to section 21(A) of the *Provincial Court Act,* R.S.N.S. 1989 as amended, for a period expiring October 31, 2007 and is composed of Professor Bruce P. Archibald, Q.C., Chair and members Ronald A. Pink, Q.C. (Nominee of the Nova Scotia Provincial Judges Association) and Terry L. Roane, Q.C. (Nominee of the Government of the Province of Nova Scotia). The Tribunal caused advertisements to be placed in Nova Scotia daily newspapers giving notice of public hearings held on March 28, 2005. Written submissions from the Government, the Nova Scotia Provincial Judges Association("the Association") and interested members of the public were solicited prior to that date pursuant to section 21(D) of the *Provincial Court Act*. Submissions were received from the Government, the Association, Chief and Associate Chief Judges, the Canadian Bar Association (Nova Scotia) through its President, Mr. Clarence A. Beckett, Q.C., and from Mr. Ross Haynes, Q.C.

2. The mandate of the Tribunal, set out in section 21(E)(1) of the *Provincial Court Act*, is as follows:

> 21E (1) A tribunal shall inquire into and prepare a report containing recommendations with respect to
>
> (a) the appropriate level of salaries to be paid to judges of the Provincial Court and the Family Court, including the chief judge and associate chief judge of each court;
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> (b) the appropriate level of per diem payments, or payments for part of a day, made to judges for presiding in the Provincial Court or the Family Court where those judges are not receiving salaries;
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> (c) the appropriate vacation and sick-leave benefits to be provided

> to judges of the Provincial Court and the Family Court;
>
> (d) pension benefits, long-term disability benefits or salary continuation, life insurance and health and dental benefits for judges of the Provincial Court and the Family Court and the respective contributions of the Province and the judges for such benefits; and
>
> (e) other non-discretionary benefits for judges of the Provincial Court and the Family Court.

This provision is similar, but not identical, to provisions in statutes from other Canadian jurisdictions establishing judicial compensation tribunals or commissions.

3. The *Provincial Court Act* also sets out a non-exclusive list of factors which the Tribunal is to take into account in coming to its decisions. Section 21(E)(3) of the *Act* reads as follows:

> (3) When making recommendations pursuant to this Section, a tribunal shall take into consideration the following:
>
> (a) the constitutional law of Canada;
>
> (b) the need to maintain the independence of the judiciary;
>
> (c) the need to attract excellent candidates for appointment as judges;
>
> (d) the unique nature of the judges' role;
>
> (e) the manner in which salaries and benefits paid to judges in the province compares to judicial compensation packages in other jurisdictions in Canada, including the federal jurisdiction, having regard to the differences between those jurisdictions;
>
> (f) the provision of fair and reasonable compensation for judges in light of prevailing economic conditions in the Province and the overall state of the Provincial economy;
>
> (g) the adequacy of judges' salaries having regard to the cost of living and the growth or decline in real per capita income in the Province;

(h) the relevant submissions made to the tribunal;

(i) the nature of the jurisdiction and responsibility of the court; and

(j) other such factors as the tribunal considers relevant to the matters in issue. *1998, c.7, s. 1; 2001, c. 5, s. 34.*

Once again, these provisions are similar, but not identical, to analogous legislative provisions from other jurisdictions in the country.

4. Judicial compensation commissions, such as this Tribunal, became a constitutional necessity following the decision of the Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 S.C.R. 3. The purpose of these commissions is to safeguard judicial independence, the hallmarks of which are security of tenure, administrative independence and financial security. Judicial compensation commissions are intended to do this by creating an "institutional sieve", or structural separation, between government and the judiciary so as to prevent direct negotiations between judges and the government. This institutional distance is intended to "de-politicise" the relationship between governments and judges, and ensure that there can be no manipulation of the judiciary by government, or appearance thereof, through the process of establishing terms of remuneration and other employment benefits for judges.

5. Judicial independence, of course, is not an end in itself. It is a key component of maintaining the rule of law in a free and democratic society, without which democratic institutions and a properly functioning civil society are at risk of being undermined. Unlike some other jurisdictions, the legislature of Nova Scotia has agreed to treat the recommendations of this Tribunal as binding, rather than merely advisory, subject to a request by the Minister of Justice

or by the Association to the Tribunal to reconsider aspects of its Report (see *Provincial Court Act*, sections 21(J), 21(K), 21(L) and 21(M)). Thus, the Tribunal has read with interest the recent decision of the Supreme Court of Canada in *Provincial Court Judges Association of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judge's Association v. Ontario Management Board; Bodner v. Alberta; Conférence des juges du Quebec v. Quebec; Minc v. Quebec (Attorney-General)* 2005 S.C.C. 44 decided July 22, 2005. While the Tribunal recognises that certain *obiter dicta* comments in the reasons for that decision may be relevant to the exercise of this Tribunal's discretion, its holdings do not in any way alter this Tribunal's statutory mandate since they arise in the context of governmental rejection of commission recommendations where there is no statutory commitment to treating the particular recommendations as binding.

6. This Tribunal (2005-2007) is the eighth such tribunal established under section 21 of the *Provincial Court Act*. The last tri-enniel tribunal (2001-2004) was composed of the same membership as the present one, and made extensive recommendations in its main report dated March 6, 2002 and a Supplementary Report on Income Protection, dated July 16, 2003. The positions of the Government and the Association take the situation established by the 2001-2004 Tribunal as their starting point. The Association and the Government agreed in their initial written submissions and oral presentations before this Tribunal that there were eight issues before the Tribunal for current consideration: (1) salaries for the next three years; (2) salary differentials for the Chief Judge and Associate Chief Judge; (3) the professional allowance for all sitting judges (full-time and *per diem*); (4) reimbursement for vehicle expenses; (5) vacation entitlement; (6) recognition of legal aid service for the public service award; (7) payment for *per*

diem judges to attend conferences and meetings; and (8) travel insurance for work-related injuries and death for *per diem* judges. To this list was added, in correspondence of early July 2005, the matter of changes to health and dental benefits for judges. Subject to its substantive statutory mandate described above, and its procedural authority under section 21(D)(1) of the *Provincial Court Act*, the Tribunal is pleased to consider the above nine issues in the sections of the Report which follow.

I PROVINCIAL JUDGES' SALARIES

7. The question of salaries is the most important and the most difficult issue with which a judicial compensation commission must wrestle. Some idealists see elevated salaries for judges as the *sine qua non* of judicial independence, ensuring that members of this important branch of government will remain above the sordid temptations of a corrupt and materialistic world. Some cynics view elevated salaries for judges as the creation of a privileged sinecure for certain fortunate lawyers who are able to move beyond the risks and stresses of the practice of law. It is not the role of this Tribunal, however, to engage with these exaggerated stereotypes. In the words of the recent Supreme Court of Canada decision mentioned above at para. 17):

> "The commission must objectively consider the submissions of all parties and any relevant factors identified in the enabling statute and regulations. Its recommendations must result from a fair and objective hearing. Its report must explain and justify its position".

This Tribunal must address the serious matter of judicial salaries through application of the statutory factors set out by the Legislature in section 21E(3) of the *Provincial Court Act* in the light of the constitutional principles and jurisprudence which have emerged since 1997. The submissions from the Association and the Government, and others noted above, have been of

critical assistance to the Tribunal in this regard. This section of the Tribunal's Report will assess the arguments and information provided in the submissions in relation to each of the factors in section 21E(3) of the *Provincial Court Act* insofar as provincial judges' salaries are concerned.

A. Constitutional Law and the Independence of the Judiciary

8. The first two factors in section 21E(3) of the *Provincial Court Act* are (a) "the constitutional law of Canada" and (b) "the need to maintain the independence of the judiciary". Clearly, these matters are inter-related. The Government takes the view that "the principle of independence can only have meaning in this context in the sense that a certain minimum salary is required to support independence, and we are well beyond that" (Government Submission, para. 48). The Government goes on to argue:

> "At this time, the principle of judicial independence finds expression, not in salary increases, because that would put a price tag on judicial independence, but in the process by which salary is reviewed, and that process is guaranteed by virtue of this tribunal's composition and jurisdiction and by the binding nature of tis recommendations". (Government Submission, para. 49)

The Association takes a broader view, stating this Tribunal ". . . should recommend salaries which are set at levels higher than the bare minimum required to survive constitutional scrutiny". (Association Submission, para. 20). The Association quotes Professor M.L. Friedland's study for the Canadian Judicial Council, *A Place Apart: Judicial Independence and Accountability in Canada*, Ottawa, 1995, where at pp. 49-50 he states:

> . . . [T]he greater the financial security, the more independent the judge will be, and so, in my view, it is a wise investment for society to err on the more generous side. Even if economic conditions were such that a very large portion of the bar was

> willing to accept an appointment at a much lower salary, we would still want to pay judges well to ensure their financial independence - for our sake, not for theirs".

There is obviously a stark difference in attitude and approach between the Government and the Association in this debate, and it might be said that the general tenor of the Canadian Bar Association (Nova Scotia) submissions was more consonant with the submissions of the Association.

9. This debate between the Government and the Association is at the level of principle, and the empirical context for its true significance lies with some of the other factors which the statute requires the Tribunal to consider. Thus, it is by attracting excellent candidates, who are committed to the unique nature of the judges role, whose compensation is fair and reasonable in the light of economic conditions, including the cost of living etc., that the practical nature of the constitutional importance of the independence of the judge gets played out. The Tribunal is loath to commit itself to some minimalist conception of judicial salaries which could lead to a risk of constitutional concern, if implemented with excessive rigour. On the other hand, Professor Friedland's injunction to "pay judges well", despite its wisdom in principle, is insufficiently precise to provide exact guidance on how to peg a dollar figure on judicial salaries. Suffice it to say that this Tribunal is very much alive to the institutional significance of the judiciary in Canada's constitutional democracy, which must be characterised by the rule of law. As the jurisprudence of the Supreme Court of Canada indicates, the maintenance of judicial independence through financial security is critical in this regard. The Tribunal takes the view that its salary recommendations which result below from considering all of the factors outlined in section 21(E)(3) of the *Provincial Court Act*, more than adequately safeguard the principle of

judicial independence for Nova Scotia's provincial judges and will shield the Province's judiciary from any concern about a failure to meet constitutional standards by virtue of inadequate remuneration.

B. Attracting Excellent Candidates for Judicial Appointment

10. Subsection 21E(3)(c) of the *Provincial Court Act* requires this Tribunal, when making its recommendations, to take into account "the need to attract excellent candidates for appointment as judges". The Association made some of its most forceful arguments in relation to this factor. The Association pointed out that between 1989 and 1991, when provincial judges' salaries increased by nearly $34,000, 9 of 12 provincial appointments came from the private bar. On the other hand, in the period between 1992 and 1997 when there were provincial wage freezes applicable to provincial judges' salaries, yet federal judges salaries rose $56,900, only 2 of 11 provincial appointments came from the private bar. Moreover, says the Association, in this latter period approximately 90% of federal judicial appointments (16 of 18) came from the private bar. The Association states that overall, from 1992 to 2005, there were 17 provincial judges appointed and only 3 came from the private bar; all the rest were from the Public Prosecution Service, Nova Scotia Legal Aid, or other forms of public-sector legal practice. The figures show that in 1993, 21 of 27 provincial judges came from private practice (77.8%), while in 2004, 11 of 25 provincial judges came from private practice (44%). Finally, the Association notes that, for example, in 2003 over 60% of the applicants for provincial judicial positions were from the public bar, with the corresponding figure from the private bar being just under 40%, and that almost 90% of the 17 interviewed by the Advisory Committee on Provincial Judicial Appointments were from the public bar, while only just over 10% were from the private bar. The

Association argues that these figures speak loud and clear for the propositions: (a) that members of the private bar are not attracted to the provincial bench because of the low salaries; and (b) that members of the private bar are attracted to the federal bench where salaries are higher. The Association's conclusion from this information is that such skewed results are a demonstration of the fact that current provincial salaries and benefits are not adequate "to attract excellent candidates for appointment as judges". The Association did not, of course, suggest that recent appointments were poor choices, but rather that the field of excellent candidates is dwindling because of the failure to attract large numbers from the private bar, and that this will have adverse consequences in the future if it continues.

11. The Government did not disagree with the Association's figures, but disputes the inferences which the Association draws from this information. The Government submitted that ". . . these statistics are not evidence of a drop in interest of candidates for [provincial] judicial appointment or that salaries are too low to attract highly qualified, highly paid, lawyers from the private bar" (Government Reply Submission, para. 42). Rather, the Government argued that the skewed results in recruiting to the Provincial bench came from formal selection criteria which have recently been changed. Under the heading "professional excellence" the "Provincial Judicial Appointments Guidelines to Ensure Appointments Based on Merit" contained the sentence: "Experience in the field of law relevant to the court on which the applicant wishes to serve is highly desirable". This criterion, says the Government, given the predominantly criminal law concentration of the work of the Provincial Court, lead to the recent, high representation of former members of the Public Prosecution Service and Nova Scotia Legal Aid among applicants and appointees to the provincial bench. The Government noted that the problematic criterion was

removed on March 3, 2004, and that there is "no need for the Tribunal to act in anticipation of a problem in composition pre-emtively increasing salaries to offset a problem that does not yet exist". (Government Reply Submission, para. 49).

12. In addition, the Government disputes the Associations' assumption that "the money" is the key issue in attracting excellent judicial appointments, or in relation to private/public recruitment differences. The Government cited the following passage from pp. 15-16 of the Report of the Federal 2004 Quadrennial Salary Commission:

> Outstanding candidates for the judiciary can be found in all types of legal practice, such as academe, government service, including the provincial or territorial courts, as counsel in corporations, as well as in private practice. In private practice, incomes vary significantly, not only by geography, but by area of practice, given that many outstanding potential candidates work in what are generally considered the less well paid segments of the profession, such as family law, criminal law, or legal aid clinics. Even in some of those areas, there are exceptions. For lawyers in private practice, many of the most successful and high-income potential candidates will have made significant capital contribution to their firm, which would be returned to them upon appointment.
>
> We have to take into account all of these factors, and the reality that while for some, judicial appointment involves a significant reduction from the income that they enjoyed in practice, for others the current level of salary and benefits may result in an enhanced economic package.

Moreover, the Government pointed out that the annual salary levels are not the only way to assess the attractiveness of judicial remuneration. Says the Government, one must also factor in vacation, travel, pension, income protection and other benefits which can be in excess of 20% of the salary component when looking at the total picture of judicial remuneration. Lawyers in private practice are often unable to provide for themselves these kind of benefits at

commensurate levels.

13. Part of the problem in drawing conclusions about the "attracting excellent candidates from private practice" arguments, is that accurate, recent information on income levels among Nova Scotian private practitioners is virtually impossible to obtain. In its submissions, the Government emphasised data found in the 2004 Federal Commission Report (Table 17, p. 46) which suggests that (based on CRA income tax figures for the year 2000, tabulated by the accountants Morneau Sobeco) in the 44 to 56 year age group critical to judicial recruitment, the 75th income percentile projected to 2004 would yield a net income of $174,800.00 for Nova Scotian legal practitioners. The Association notes that this information seems to indicate a decrease in income for this level from the previous federal commission report, and speculates that this could result from institutional changes associated with law firm incorporations rather than actual declines in real income. The Association points to a voluntary survey conducted for 2004 by *Canadian Lawyer* magazine which indicates that in a sample of 22 Atlantic Provinces law firms, 24% of partners were reported to be making incomes in excess of $200,000. With this information, the Government argues that provincial judicial salaries at the current level of approximately $163,000 (with 20% or so pension and other benefits added) are sufficient to draw excellent interested applicants from private practice, while the Association argues the reverse. It may be of interest that the Canadian Bar Association (Nova Scotia) made submission which were consistent with those of the Association. The CBA (Nova Scotia), with reference to current provincial judicial salaries in Nova Scotia states: "This is not a healthy situation. Compensation must be such, so that the best and most qualified candidates are encouraged to seriously consider a position on the Bench, for the benefit of the community as a whole". The

CBA (Nova Scotia) believes this is currently not the case.

14. The Tribunal must make a judgement in relation to this factor which, of necessity, will be based on less than perfect information. However, based on the arguments, and statistical and other information with which the Tribunal was provided, we conclude that, subject to what will be said in relation to other factors, the weight of this factor, "the need to attract excellent candidates for appointment as judges", militates in favour of at least a modest increase in provincial judicial salaries in real terms.

C. The Unique Nature of the Judge's Role

15. As Supreme Court jurisprudence and our 2002 Tribunal Report indicate, provincial judges are public servants but not civil servants. The Association suggests that this leads to the conclusion that judges' salaries "should not be set by reference to salaries of civil servants" (Association Submission, para. 50). On the other hand, the Government, in reliance on the approach taken by the Federal Commission which has in the past seen Deputy Minister salaries as a relevant comparative consideration, provided the Tribunal with information on civil service salaries in the Province. Most Nova Scotian deputy ministers make between $93,000 and $120,000 while one makes $140,000 (Education) and another (Health) makes $169,999. By contrast, the Deputy Director of the Public Prosecution Service makes $128,000. In principle, perhaps the greatest relevance of these sorts of figures is to create a kind of floor which relates back, in some measure, to the notion of judicial independence. The argument has been made in other contexts, that provincial judges' salaries ought not to be lower than those of provincial civil servants to avoid the possibility that a compliant judge could be rewarded by a provincial government with a more lucrative civil service appointment. Current provincial judges' salary

levels, to say nothing of specialised areas of competence, virtually rule out this potential phenomenon. However, this kind of consideration may be relevant to the House of Assembly's decision to make judicial compensation packages in other jurisdictions, rather than civil servant compensation packages, an explicit statutory comparator in *Provincial Court Act*, section 21E(3)(e) (about which more will be said below).

16. In any event, the primary thrust of the Association's argument in relation to the unique nature of the judge's role, relates to the economic and social constraints which the judicial role places upon its incumbents. As the 2002 Tribunal, among others, has noted, provincial judges are forbidden by statute from seeking any other remunerative employment to supplement their judicial salary. This would be inconsistent with the principle of independence, allowing certain judges to be beholden to other paymasters. Furthermore, judicial canons of ethics place constraints on judges which prevent them from engaging in politics, charitable fund-raising, and many other community and social activities deemed incompatible with the independence and, indeed, the dignity of judicial office. These are economic and social costs of a personal nature which are borne by judicial appointees, which are not contested by the Government.

17. The Tribunal acknowledges that these economic and social constraints are real. As the 2003 Alberta judicial compensation commission somewhat dramatically state: ". . . a provincial court judge cannot easily pursue another career, and in most cases, must continue as a judge until retirement, disability or death". That these are the common realities of the unique nature of the judge's role, does not render them easily quantifiable. However, the Tribunal has been mindful of these considerations in establishing salary levels for this triennial period, in the context of all the relevant factors.

D. Comparison with Judicial Compensation Packages in Other Jurisdictions

18. Along with the issue of attracting excellent candidates, it was this matter of comparison of Nova Scotia provincial judicial salaries with other jurisdictions which received the greatest emphasis in the arguments of the Association. It will be recalled that the *Provincial Court Act* section 21E(3)(e) requires the Tribunal to take into consideration "the manner in which salaries and benefits paid to judges in the Province compares to judicial compensation packages in other jurisdictions in Canada, including the federal jurisdiction, have regard to the differences between those jurisdictions". The arguments of the Association on this topic were presented essentially in relation to two main themes: (a) the "gap" between Nova Scotia provincial judges' salaries and the salaries of federally appointed judges; and (b) the judicial salaries of other Canadian provinces and territories by comparison with those of Nova Scotia. The arguments of the Association and the positions of the Government in relation to each of these themes will be summarised briefly.

19. The Association argued that the salary gap between provincially appointed judges and federally appointed judges perpetuates a public perception of a judicial hierarchy where provincially appointed judges are of a "second class status" when compared to their federal counterparts (Association Submission, para. 10). The Association pointed to comments in reports by judicial compensation commissions in Alberta, British Columbia, Ontario, Newfoundland and Saskatchewan, as well as the Law Reform Commission of Canada, which decried the inappropriate nature of this invidious comparison between the two levels of judicial appointees (Association Submission, pages 6-9). The Association then provided figures which show that the present salary gap between federal and provincial judicial appointees in Nova Scotia has risen to

what it calls "an alarming" $76,658. The Association's Table showing the comparative "gaps" in Nova Scotia since 1987 is as follows:

TABLE 1 - SALARY GAP

	Nova Scotia Provincial & Family Courts	County Court Salary	$ Difference	Nova Scotia Supreme Court Salary	$ Difference	Provincial Salary Expressed as a % of Federal Salary
1987	68,251	116,300	(48,049)	121,300	(53,049)	56.3
1988	85,000	122,700	(37,700)	127,700	(42,700)	66.6
1989	89,000	128,800	(39,800)	133,800	(44,800)	66.5
1990	97,000	135,400	(38,400)	140,400	(43,400)	69.1
1991	102,100	142,800	(40,700)	147,800	(45,700)	69.0
1992	102,100	150,800	(48,700)	155,800	(53,700)	65.5
1993	102,100	150,800	(48,700)	155,800	(53,700)	65.5
1994	102,100	150,800	(48,700)	155,800	(53,700)	65.5
1995	102,100			155,800	(53,700)	65.5
1996	102,100			155,800	(53,700)	65.5
1997	102,100			159,000	(56,900)	64.2
1998	124,000			175,800	(51,800)	70.5
1999	130,000			179,200	(49,200)	72.5
2000	137,000			198,000	(61,000)	69.2
2001	144,000			204,600	(60,600)	70.4
2002	157,000			210,200	(53,200)	74.7
2003	160,140			216,600	(56,460)	74.0
2004	163,342			240,000*	(76,658)	68.1

*This figure was set by the 2004 Federal Quadrennial Commission Report to be effective April 1, 2004. The government has advised the federal judges that it will be accepting the salary recommendations contained in the Report although Parliament is not expected to formally approve this until March, 2005. As a result, federal judges are currently receiving salaries of $219,400. However, once formally approved, the salary figure of $240,000 will be retroactively applied to April 1, 2004. Therefore, this is the federal salary figure for April 1, 2004, that will be used by the Association throughout these submissions.

The Association says that the current federal provincial salary gap in Nova Scotia of $76,658

represents "the largest salary gap since the first tribunal was appointed in 1988-1989 to make salary recommendations for Provincial Court judges" (Association Submission, para. 13). The Association, of course, links this gap to what it sees as the failure of large numbers of excellent candidates to be attracted to provincial judgeships, while they continue to be attracted to federal judicial positions.

20. The Government disagrees with the premise from which the Association begins with its "second class status" argument in relation to provincially appointed judges. It asserts that a judicial hierarchy, apparently at least in relation to appellate jurisdiction, is a natural and necessary part of our judicial system, and one which has been recognised as a possibility (though not recommended) by the 2004 Federal Judicial Compensation Commission in relation to differentiating trial and appellate judges' salaries at the federal level. (Government Reply Submission, para. 29). The Government points out that a single salary is set for all Federally appointed judges, irrespective of where those judges happen to serve or reside. The Government also contests the Association's assertion that the current federal-provincial gap in Nova Scotia is "by far the largest gap since the first tribunal was appointed in 1988 & 89." The Government argues that "in real dollars", which take inflation into account, the gap is less significant ("The 2004 salary gap of $76,658, in 1989 dollars, is equivalent to $49,268 as compared to the gap in 1989 of $44,800" (Government Reply Submission, para. 31). Despite the elaborate table and explanation supporting this Government claim, its implications would be clearer if sitting provincial judges and potential candidates for appointment were buying things today priced in "real dollars" from 1989. The Government is possibly on stronger ground in its arguments based on percentages. It rightly says that the Nova Scotia tribunal recommendations of 1989 put

provincial judges' salaries at 66.5% of those of federal judges, while the 2004 gap of $76,658 works out to a roughly comparable 68.1%. (Government Reply Submission, para. 33). The Government points out that Nova Scotia Tribunals have historically set provincial judicial salaries from 66.6% of federal salaries in 1988 to 74.7% of federal salaries in 2002. The Government observes that 1988 and 1998 were "catch up years" where Nova Scotian provincial judges' salaries had for different reasons, fallen particularly behind relevant comparator jurisdictions. Finally, the Government disputes the validity of the empirical foundation for the Association's claim that private sector lawyers are primarily attracted to federal appointments as being rooted in atypical recent experience that lacks predictive reliability. Moreover, it says the changed "experience criteria", discussed earlier, will compensate for such a problem were it thought to exist.

21. This matter of "the gap" between federal and provincial judges has been variously addressed by Nova Scotia tribunals in the past. One tribunal suggested it would be appropriate to move toward a standard which would set provincial judges' salaries at 85% of the federal level. This was attractive to the Association, and was its opening position. Using the year 2004 as a comparator with federal salaries at $240,000, such an approach would yield a putative provincial judge's salary of $204,000. However, as the Government pointed out in argument, such a formulaic linkage with federal judicial salary levels is ruled out by the use of the factors in section 21E(3) of the *Provincial Court Act*. Moreover, in the recent Supreme Court of Canada decision cited earlier, the approach of the New Brunswick commission was criticised in this regard. At para. 71 the court stated:

> The [New Brunswick] Government objected to the salary increase because it believed that in granting an increase of this magnitude, the Commission was in fact giving effect to the Provincial Court judges' argument that they should be granted parity or partial parity. Even though the Commission explicitly stated that it did not accept the parity argument, there is, in reality, an obvious connection between the recommended increase and the salary of federally appointed judges that transcends the report: the recommended increase would result in the judges' salary equalling 85 percent of the salary of federally appointed judges. This figure corresponds to the Government's submission, mentioned by the Commission in its report, that the average per capita income in New Brunswick is equal to 85 percent of the Canadian average. This would account for the figure, not otherwise explained, chosen by the Commission for the recommended increase.

The court continued in the next paragraph:

> The role of the reviewing court is not to second-guess the appropriateness of the increase recommended by the Commission. It can, however, consider the fact that the salaries of federally appointed judges are based on economic conditions and lawyers' earnings in major Canadian cities, which differ from those in New Brunswick. As a result, while the Commission can consider the remuneration of federally appointed judges as a factor when making its recommendations, this factor alone cannot be determinative. In fact, s. 22.03(6)(*a.1*) of the *Provincial Court Act* requires the Commission to consider factors which may justify the existence of differences between the remuneration of Provincial Court judges and that of other members of the judiciary in Canada, yet the Commission chose not to address this. Moreover, it is inappropriate to determine the remuneration of Provincial Court judges in New Brunswick by applying the percentage ratio of average incomes in New Brunswick to those in Canada to the salary of federally appointed judges, because the salary of federally appointed judges is based on lawyers' earnings in major Canadian cities, not the average Canadian income.

This Tribunal sees such commentary as relevant and helpful in relation to the exercise of its discretion under sub-section 21E(3)(e) of the *Provincial Court Act*. Taking all factors under section 21E(3) into account, it would not be inappropriate if the Nova Scotia provincial salaries

were in the mid to high range of where the gap has been in historical percentage terms. However, setting some fixed percentage of the federal salary as the basis for our determination is not an appropriate way for this Tribunal to address the problem.

22. Aside from comparison with federal judicial salaries, section 21E(3)(e) mandates this Tribunal to examine judicial compensation packages in other jurisdictions, but once again "having regard to the differences between [sic] those jurisdictions". Determining the salaries in other jurisdictions at any given time is not a simple matter. The figures form a series of moving targets with recommendations from commissions being made at various times, being retrospective in effect, being subject to alteration by governments in implementation (in some jurisdictions) and the like. For purposes of argument, however, the Association and the Government agreed to the following Table, originally proposed by the Association:

SALARY COMPARISONS

Province	Recommended Salary April 1, 2005	Actual Salary April 1, 2005
British Columbia	$167,765[1]	$161,250
Alberta	$220,000	$220,000
Saskatchewan	$166,467	$166,467
Manitoba	$161,257	$161,257
Ontario	$210,243	$210,243
Quebec	$211,100[2]	$161,133[3]
New Brunswick	$173,201[4]	$150,706
Prince Edward Island	$169,439	$169,439
Newfoundland	$159,181	$159,181
Yukon	$193,698[5]	$193,698
Northwest Territories	$204,678	$204,678
CANADIAN AVERAGE	**$185,184**	**$178,005**

1- 2004 JCC recommended that the salary effective January 1, 2004, should be $161,250 plus change in CPI over the period of January 1, 2003 to December 31, 2003. It also recommended that the salary effective April 1, 2005 should

be the March 31, 2005 salary plus change in CPI over the period of January 1, 2004 to march 31, 2005. We have assumed a 2% increase for both these adjustments. As part of public sector freeze, judges do not get recommended CPI increases on January 1, 2004 or April 1, 2005.

2 - 2004 JCC recommendation for July 1, 2005. JCC recommended salary of $205,000 for July 1, 2004 to be increased on July 1, 2005 by $2000 plus change in CPI. We have assumed a 2% CPI increase.

3 - Government Response to 2004 JCC Report imposed a salary of $161,133 effective July 1, 2005.

4 - 2001 JCC recommended salary of $169,805 effective January 1, 2003 plus increase in NBIAI. We have assumed a 2% increase.

5 - Yukon JCC Report set salaries of Territorial Court Judges for April 1, 2005 at $189,000 per annum plus increase in Whitehorse CPI from January 1, 2004 to December 31, 2004. The increase in CPI during this period was 2% which gives the salary figure of $193,698.

The recent decision from the Supreme Court of Canada, of course, has implications for the inter-relationship between the "recommended" and "actual" salary columns in this Table, in the sense that the reasons in that case provide a means by which Governments in jurisdictions with "advisory" commissions can justify departures from recommendations in setting judicial salaries.

23. Subsequent to the hearing, the Tribunal was provided with the Report of the Prince Edward Island Judicial Remuneration Review Commission. In that Report, the Commission somewhat reluctantly agreed to continue, but put under re-consideration, its policy of establishing provincial court judges' salaries in that province at the national average for provincial judicial salaries (including the northern territories, but excluding federal salaries). Such a calculation, according to the figures in the preceding table, would put 2005 P.E.I. provincial judges' salaries at $178,000. It is interesting to note that the Association did not advocate such an approach before this Tribunal. It maintained its position on closing the "federal gap", either by the 85% approach or a fixed increase to a "lesser gap situation". While the Government adopted a "cost of living increase" as its first line position, it did suggest in an alternative submission that "having regard to the differences between the jurisdictions" might mean aligning Nova Scotia judicial salaries with an average of those of the other Atlantic

Provinces and Manitoba, which it argued, are the provinces whose needy financial situations are demonstrated by the transfer payments received under federal-provincial financial equalisation arrangements for the 2004-2005 fiscal year. Based on the "provincial" figures in the foregoing Table, and using "Actual Salaries April 1, 2005" for the purposes of the calculation, this would yield a figure of $160,146. While the Government did not suggest a roll-back of Nova Scotia provincial judges' salaries based on this figure, it did support its argument for a simple "cost of living" increase based on this approach. Needless to say, the Association, and indeed by implication, the Canadian Bar Association (Nova Scotia), took a dim view of this sort of reasoning.

24. In relation to section 21E(3)(e) of the *Provincial Court Act* dealing with comparator jurisdictions, this Tribunal, as it was in 2002, expects to see a "reasonable", as opposed to an ever expanding, federal gap. With respect to the other Canadian comparator jurisdictions, we find that there are relevant reasons for excluding certain jurisdictions from the calculation of national averages. Provincial judicial salaries in the most wealthy provinces, that is Alberta and Ontario, at $220,000 and $210,000 respectively, do represent obvious "outliers" from the range. Similarly, the salaries of the Yukon and Northwest Territories judges would seem to represent a response to unique northern living conditions, the northern professional environments and fiscal capacities related to territorial status with the federal government. An average of the "actual salaries" for April 1, 2005 in the remaining non-federal jurisdictions produces a figure of $161,357, while an average of the salaries recommended by compensation commissions for those jurisdictions is $172,500. These calculations, of course, must be seen in the light of the Supreme Court of Canada's acceptance of the New Brunswick Government's negative response

to the province's judicial salary commission recommendations, and the Court's rejection of the Quebec Government's negative response to the recommendations of that province's commission.

E. Economic Conditions in the Province

25. Section 21E(3)(f) requires this Tribunal to take into account the "provision of fair and reasonable compensation for judges in light of prevailing economic conditions in the Province and the overall state of the Provincial economy". The Association argues that the provincial economy, and the state of provincial government finances related thereto, have not been better for many years. Unlike the past tribunals, this Tribunal faces a situation where the Government has had balanced budget for the past three years. There have been significant increases in federal-provincial transfers to this Province in the health care and offshore petroleum contexts which are referred to in the Confidential Financial Brief from the Government to the Tribunal, to which the Association had access. The Association made reference to the RBC Financial Group *Provincial Outlook* Report of December 2004 which states:

> "Nova Scotia can boast about having one of the healthiest fiscal positions among the Atlantic Provinces . . ."

The Report then refers to the Government's financial prudence and the potential benefits of the then merely prospective federal/provincial offshore energy royalty agreement, which ultimately has come to pass.

26. The Government's Fiscal Brief, however, strikes a cautious tone. Among its key points are the assertions that: (i) some recent federal funding increases, which were late in coming, were for 2004-2005 fiscal year only, and cannot be carried over to subsequent years; (ii) federal funding in 2005-2006 and beyond is not expected to keep pace with spending increases in health

care and other social programmes; (iii) Nova Scotia continues to have one of the highest debt levels in the country and has the second highest net direct debt to GDP ratio in the country; (iv) the $830,000 million received from the Offshore Agreement will be applied to the debt of Nova Scotia; and (v) the Province's debt retirement plan requires $106 million in fiscal 2007-2008 to stop growth in the level of debt in the Province. In addition, along with Prince Edward Island, Nova Scotia is just above Newfoundland in having some of the worst credit ratings among all Canadian Provinces as assessed by the Dominion Bond Rating Service, Standard & Poor and Moody's. Almost 85% of the Province's Budget is spent on four areas: Health (38.7%); Education (20.1%); Debt Servicing (14.6%) and Community Services (11.4%). Judicial salaries come out of the remaining 15.2% which supports all other government services. Wages account for 63% of the total program expenses of all government departments, and exceeding budgeted wage amounts by 1% will increase the wage bill by $33 million, before calculating the cost of accompanying benefits. In such circumstances, says the Government, all it can afford is a cost of living increase on the current judicial salaries (starting at the $163,342.00 for 2004) for each of 2005, 2006 and 2007.

27. The Association disagrees with the conclusions which the Government draws from the financial information which it presented. The Association sees a budget surplus in the offing of $2.7 million, according to a Nova Scotia Department of Finance "Forecast Update" of December 20, 2004. The Association calculates that judicial salaries constitute 1/10 of 1% of the Provincial Budget and that a substantial increase to "close the federal gap" for 25 provincial judges will have little impact on the total budget which is in the range of $3.654 billion dollars. Moreover, says the Association, there is no evidence that a substantial increase in judges salaries, given

their unique role and salary setting mechanism, will have a "ripple effect" which would cause increases in general civil servant wages.

28. The Tribunal has reviewed the data provided by the Government on the prevailing economic conditions in the Province and the overall state of the Provincial economy, including the Government's financial situation. The situation is clearly mixed, but in many respects better than it has been for some time. See: Atlantic Provinces Economic Council, *Atlantic Report*, Vol. 39, #3, Fall 2004 provided by the Government at pp. 14 and 15. The Tribunal has concluded that fair and reasonable compensation for provincial judges, in the light of all the factors we must consider, does go beyond a "cost of living increase" as proposed by the Government (see the discussion which immediately follows) and that the Province can afford a modest step toward ensuring that the federal-provincial gap, for example, does not exceed a traditionally acceptable range for the Province, while keeping in line with appropriate comparator jurisdictions in Canada.

F. Cost of Living and Per Capita Incomes

29. Section 21E(3)(g) of the *Provincial Court Act* directs this Tribunal to take into consideration "the adequacy of judge's salaries having regard to the cost of living and the growth or decline in real per capita income in the Province." Both the Association and the Government relied on the same information in making their arguments under this heading. This was largely based on the Nova Scotia Consumer Price Index (CPI), the Nova Scotia Weekly Earnings under the Industrial Aggregate Index (IAI), and the respective annual changes in these figures (expressed in percentage terms) since this Tribunal's last Report (2002-2004). The changes in the Consumer Price Index for the Province, as representing increases in the cost of living were:

2002 : 3%; 2003 : 3.4%; and 2004 : 1.8%. (See Government Book of Authorities, Tab 6, Graph "Nova Scotia Consumer Price Index (CPI) and Growth Rate Projections: 1992=100"). The changes in the average weekly earnings under the Industrial Aggregate Index were as follows: 2002 : 4.5%; 2003 : 1.2%; and 2004 : 2.8%. (Government Book of Authorities, Tab 15). The last Tribunal set an initial provincial judges salary for 2002 at $157,000, and made increments for 2003 and 2004 on the assumption that the "cost of living" would rise by 2% per year. As it turned out, this was an underestimate. If one compares the actual salary increases received by provincial judges under the recommendations in the last Tribunal Report with what they would have received had their salaries gone up in paces with the cost of living (the CPI) or the increases in real per capital income (IAI), one can see that the judge's salaries have decreased in "real terms" by comparison to either measure. The following Table illustrates this phenomenon, and also provides a national figure for 2005 salaries using figures based on percentage changes in CPI and IAI for 2004 by projecting beyond in the two "hypothetical" columns.

Nova Scotia Judges Salaries: CPI and IAI Comparisons

Actual Salary	CPI	IAI
2002 $157,000	----	----
2003 (+2%) $160,140	(+3%) $161,710	(+4.5%) $164,065
2004 (+2% $163,342	(+3.4%) $167,208	(+1.2%) $166,033
2005	(+1.8%) $170,217	(+2.8%) $170,682

The current salary for provincial judges (2004) is $163,342, whereas had the salary kept pace with the cost of living (CPI) it would have been $167,208 or had it kept pace with the growth in per capita incomes (IAI) it would have been $166,033.

30. The Association urges the Tribunal to address the federal/provincial gap with a

significant new salary increase to which ought to be at 85% of the 2004 federal salary of $240,000 ie. $204,000 and then keep pace with the rise in the cost of living by use of the federal IAI as a proxy, which would maintain "the gap" at a tolerable level since this is the method of calculation under the *Federal Judges Act*, section 25. This approach has not only been the subject of adverse comment by the Supreme Court of Canada in the recent decision on the consolidated appeals, but is inconsistent with section 21E(3)(g) of the *Provincial Court Act* which speaks of the cost of living and growth decline in real per capita income *in the Province* (emphasis added). On the other hand, the Government urges the Tribunal to set the 2005 salary for provincial judges by adding a cost of living increase of 1.8% (the CPI percentage increase for 2004) to the current salary level of $163,342. This would yield a 2005 salary of $166,282. The Tribunal concludes that such an approach would set an inadequate salary for 2005 since it would be $4,000 or so under the figures which reflect cost of living increases and growth in real per capita income since 2002. Moreover, in conceptual terms it responds in a unidimensional way to "cost of living increases" and not growth in real per capita income. The Tribunal concludes that in order to provide adequate salaries in relation to the cost of living and per capita income growth, the salary level for 2005 must be set at a very minimum in the range of $170,000 on this set of factors. How this plays out in relation to the other factors set out in section 21E(3) of the *Provincial Court Act* will be addressed below.

G. The Jurisdiction and Responsibilities of Provincial Courts

31. Nova Scotia's provincially appointed judges are members of the Provincial Court, which handles largely criminal and quasi-criminal matters, as well as those Family Court judges who have not yet become members of the integrated Supreme Court of Nova Scotia, Family Division. It is in this context that the Tribunal must assess matters relevant to *Provincial Court Act* section 21E(3)(i) which requires us to consider "the nature of the jurisdiction and responsibility of the court".

32. The Association, not surprisingly, chose to stress the extremely important role of Provincial Court Judges in criminal matters. While Provincial Court judges do not sit with juries, and cannot hear cases of treason, piracy, murder and a small list of political offences listed in section 469 of the *Criminal Code*, they do try the vast bulk of criminal charges (over 99%) and constitute the judicial starting point for all such offences. Many offences, such as sexual assaults, can involve highly complex trials and virtually any criminal matter can raise significant constitutional issues arising under the *Charter of Rights and Freedoms.* As has been noted by many judicial compensation commissions, the Provincial Court is the workhorse of the criminal justice system, dealing with matters which can run the gamut from minor provincial road traffic offences to major federal property crimes and offences of serious personal violence. While most Nova Scotians will never see the inside of a Supreme Court courtroom, many (both youths and adults) will have seen the inside of a Provincial Court. For this latter group, the presiding judge in Provincial Court embodies the public face of justice in Nova Scotia. The submissions of the Canadian Bar Association (Nova Scotia) reinforced those of the Association in this regard.

33. The Government provided statistics to the Tribunal on the numbers of persons charged

with offences by the police (which has gone down significantly since 1991), the number of federal statute cases initiated in Provincial and Family Courts (which has gone down slightly of late), the number of "federal cases reaching final disposition (which has been going down), the average number of charges per case (which has been going up), the proportion of multiple charge cases as a percentage of all cases (which has been going up), and the average days elapsed from first appearance to final outcome (which has generally gone up over the past ten years). The Government acknowledges that its data ". . . may be indicative of cases getting slightly more complex . . . and thus taking slightly longer to resolve . . ." (Government Book of Authorities, Vol II, Tab 12), but argues "there has been no increase in the nature of the jurisdiction and responsibility of the provincial courts that would justify a significant increase in judicial salaries" (Government Submission, p. 13).

34. The Tribunal concludes that the Government is correct in that there has been no major shift in the nature of the jurisdiction and responsibility of the Provincial and Family Court which would warrant a significant salary increase at this time. On the other hand, the nature of the jurisdiction and responsibility of the provincial courts is extraordinarily important to the Canadian and Nova Scotian justice systems, and does not permit the Tribunal, for example, to allow provincial judicial salaries to fall disproportionately behind their federal counterparts or their provincial counterparts from relevant comparator provinces where, in its judgement, the provincial economic situation would allow otherwise in the light of all the other factors we must consider.

H. Conclusion and Recommendations on Salary

35. Taking all of the information it has received and the relevant submissions into account, the Tribunal has concluded that the following recommendation on salaries strikes an appropriate balance among the factors which section 21E(3) of the *Provincial Court Act* requires us to take into consideration:

Recommendation 1 - Salaries

The Tribunal recommends that provincial judicial salaries for the 2005-2007 period to be as follows:

(a) commencing April 1, 2005, the sum of $172,000.00;

(b) commencing April 1, 2006, the sum of $176,300.00; and

(c) commencing April 1, 2007, the sum of $180,708.00

Comment:

36. In making this recommendation, the Tribunal has set the initial figure in the light of its assessment of the relevant factors. As to the annual increases for the two subsequent years, the Tribunal has used what it considers a modest fixed percentage of 2.5%. It will be recalled that the previous Tribunal's estimate of 2% increases after first year figure led to salaries which fell seriously behind the cost of living and the growth in real per capita income in the Province. Given the information on economic trends provided by the Government, the Tribunal has concluded that the 2.5% figure is a fair and reasonable estimate for appropriate annual increases. Should our forecast prove erroneous, relevant adjustments can be made by the Tribunal or its successor in the future.

II DIFFERENTIALS FOR CHIEF AND ASSOCIATE CHIEF JUDGES

37. The Chief Judge of the Provincial Court and the Chief Judge of the Family Court receive

a differential of $10,000 in addition to the salary which they would receive as a puisne judge. The Associate Chief Judge of the Provincial Court receives a differential of $5,000 in addition to his regular salary. Since the reduction in size of the Family Court with the creation of the Supreme Court Family Division serving Halifax and Cape Breton, there is no Associate Chief Judge for the Family Court. The 1994 Tribunal was the first to make recommendations concerning the differentials for Chiefs and Associate Chiefs (there were then two of the latter). The Tribunal accepted the Government's position then for a $6,000 differential for the Chief Judges and half that amount for Associate Chief Judges. At that point in time, the positions were relatively new and the roles of the incumbents not clearly defined. Since that time the positions have evolved considerably. The 2002-2004 Tribunal declined to recommend changes to the then differentials of $10,000 and $5,000 for Chiefs and Associates respectively, on the grounds that more detailed information about the activities of those who occupy these positions was needed, both in respect of the Nova Scotian incumbents and comparator administrative judges in other Canadian jurisdictions.

38. The Association made lengthy submissions on the topic supported by a wealth of supporting documentation. A specifically focussed submission and reply were received by the Chief and Associate Chief Judges (Judges Curran, Comeau and Gibson) on the issue of "red circling" of the differential salaries at the end of an incumbent's term in the position. The Government, needless to say, made submissions and provided information as well. Thus, the Tribunal is now in a position to give full consideration to the matter. There was no suggestion that differentials should or could be abandoned, but there are three salient issues arising from this general topic: (a) Should the Chiefs and Associate Chief receive differing or identical differential

salary amounts? (b) Should the differential be a fixed amount or calculated as a percentage of the salary of puisne judges?; and (c) Should the differentials be "red circled" for incumbents at the end of their terms in office? The first two issues and submissions of the parties in relation to them will be dealt with together. The red circling issue will be addressed thereafter.

(A) Calculating the Differential Fee for Chiefs and Associate Chiefs

39. The Association took the position that the Chiefs and Associate Chief have complimentary, and often overlapping, administrative responsibilities of an equivalent nature, such that the salary differentials ought to be identical. Section 15(1) of the *Provincial Court Act* states that the Chief Judge is ". . . responsible for the administration of the judicial functions of the court, including, without limiting the generality of the foregoing, the scheduling of sittings of the Court and the assignment of judicial duties". Sub-sections 15(2) and (3) give the Chief Judge the authority to suspend a puisne judge and seize the Judicial Council to investigate the circumstances giving rise to such a suspension and take appropriate action. The role of the Chief of the Family Court is analogous. The 1993 legislation creating the positions of Associate Chief judge did not specify the responsibilities of office, but it is generally understood that Associates were to perform administrative duties as assigned by the Chief Judge and fill in for the latter when he or she was not available. The Association reads into the title "Associate Chief", as opposed to "Assistant Chief" or "Regional Senior Judge" as exist in some other Canadian jurisdictions, a shared responsibility for judicial administration and leadership. To the extent that there is an agreed upon division of labour between Chief and Associate Chief in the circumstances, the Association asserts that each must be familiar with all the responsibilities of the other so as to be able to fill in at will for periods of the other's absence or unavailability.

40. In addition to the scheduling and assignment of judicial tasks, the Chiefs and Associate meet as required with the Deputy Minister of Justice and Director of Court Services to discuss operational and budgetary issues. They meet with other officials, such as the Director of Public Prosecutions, representatives of the Nova Scotia Barristers' Society, the Canadian Bar Association, the Legal Aid Commission, law enforcement agencies, the media and others in the community, to address matters arising periodically from their interactions with those represented by such interlocutors. In addition, the Chief Judge of the Family Court meets on occasion with the Deputy Minister of Community Services and chairs an Appeal Committee under section 25 of the *Adoption Information Act*. The Association argues that these are day to day responsibilities of the Chiefs and Associate Chief which take time, preparation and follow-up and which ought to be reflected in an appropriate and equal salary differential by comparison to puisne judges.

41. The Association also stressed the role played by provincial Chiefs and the Associate in an innovative organisation entitled "The Executive Office of the Nova Scotia Judiciary". This body, established in cooperation with the Minister and Deputy Minister of Justice, has an "executive" Board comprised of the Chiefs and Associate Chiefs of the Nova Scotia Supreme Court, Court of Appeal, Provincial Court and Family Court who make decisions by consensus. The organisation is staffed by an Executive Director, a Communications Officer and an Administrative Assistant. The initiatives undertaken by this organisation include: the creation of a website (www.courts.ns.ca) to provide the public with information on the Province's courts; development of an educational programme for high school students called "Courtrooms and Classrooms"; creation of a searchable courts data base; providing for media liaison with the

courts including a Media Guide; establishing a Community Liaison Committee which has focussed on historically disadvantaged groups and organisations; participation in planning replacement and upgrading of courthouses in the Province through the "Courthouse Standards Committee"; assessment and management of security risks associated with courthouses and particular trials; and dealing with shared issues concerning information technology as it relates to the Province's courts. The Association argues that the involvement of the Chiefs and Associate Chief in these activities is not only beyond the responsibilities of the puisne judge, but is conducted on a basis of equality and shared responsibility which merits substantial and equal compensation through an appropriately calculated salary differential.

42. The Association's final argument in relation to the proposal for an equal salary differential for the chief Judge and Associate Chief Judge of the Provincial Court relates to the latter's new responsibilities for supervision and scheduling of Justices of the Peace. Amendments to the *Justices of the Peace Act* in 2002 created a new category of "Presiding Justices of the Peace" (PJPs) of whom there are currently 17. These PJPs have jurisdiction to issue search and arrest warrants (including "telewarrants") under the *Criminal Code*, deal with interim release (including "telebail") under certain circumstances when Provincial Courts are not sitting, issue emergency Protection Orders under the *Domestic Violence Intervention Act*, and handle other miscellaneous matters under federal and provincial legislation. Three PJPs preside in Sydney and 14 preside in conjunction with the J.P. Centre in Dartmouth. This J.P. Centre operates 365 days a year on a 24 hour a day basis providing J.P. services. The Associate Chief Judge of the Provincial Court organises education and training for these PJPs, chairs a "J.P. Centre Stakeholders Committee", and deals with operational, administrative and legal issues

connected with the J.P. Centre on a daily basis. The Association argues that these PJP responsibilities along with the Associate Chief's other duties, justify setting the Associate Chiefs differential at the same level of that of the Chief Judge of the Provincial Court. The Association notes, however, that the Chief Judge must also be familiar with the supervisory issues relating to PJPs since he must be prepared to fill in for the Associate chief should the latter be absent or unavailable.

43. The Association provided the Tribunal with helpful information of a comparative nature on salary differentials between puisne judges and "administrative judges" in other jurisdictions cross the country. While the Association provided information for the years 1997, 1998 and 2004, we present the Table summarising the latter as a useful overview.

SALARY DIFFERENTIALS BETWEEN PUISNE JUDGES,
CHIEF JUDGES AND ASSOCIATE CHIEF JUDGES
AS OF DECEMBER 1, 2004

Jurisdiction	# of Full Time Puisne Judges	SALARIES			DIFFERENTIALS			
		Puisne Judges	Chief Judge	Ass. Chief Judge	Chief Judge	%	Ass. Chief Judge	%
B.C.[4]	146	161,250	180,600	170,925	19,350	12.	9,675	6
Alberta[6]	104	210,000	225,000	217,500	15,000	7.2	7,500	3.6
Sask.	44	161,634	171,634	166,634	10,000	6.2	5,000	3.1
Manitoba	37	161,257	171,257	166,257	10,000	6.2	5,000	3.1
Ontario[5]	271	209,031	232,078	227,013	23,047	11.0	17,982	8.6
Quebec[3]	270	155,492	181,926	178,726	26,434	17.0	23,234	15.0
N.B.	27	150,706	160,706	155,706	10,000	6.6	5,000	3.3
N.S.[7]	29	163,342	173,342	168,342	10,000	6.1	5,000	3.1
P.E.I.	2	169,084	174,084		5,000	2.9		
Nfld.	22	159,181	168,731	163,956	9,579	6.0	4,775	3.0
Yukon[8]	2	178,000	185,000		7,000	4.0		
N.W.T.	2	197,814	211,328	198,814	13,514	6.7		
N.S.S.C.[1]	29	240,000	263,000	263,000	23,000	9.6	23,000	9.6
		Average Differential[2]			13,538.54	7.8	10,617	5.8

[1]. Nova Scotia Supreme Court

[2]. Average Differential of Provincial and Territorial Courts, excluding N.S. provincial Judges and N.S.S.C.

[3].Based on salaries currently being paid. Compensation Commissions Report, subject to litigation.

[4]. Based on Recommendations in Report dated September 25, 2004.

[5]. Ontario also has a number of Regional Senior Judges who are paid $219,416. These salaries subject to adjustment by the 6th Triennial Commission whose recommendations will be effective April 1, 2004.

[6]. Based on salaries recommended by the 2003 Judicial Compensation Report, currently being paid, but subject to results of litigation between Government and the Association, which will result in salary roll backs to $193,000 for puisne judges, $208,000 for Chief Judge and $200,500 for Assistant Chief Judges if government is successful with its appeal.

[7]. The 29 puisne judges in N.S.. includes 23 Provincial Court and 6 Family Court Judges.

[8]. J.C.C. recommendation to increase differential to 8,000 effective April 1, 2004.

44. It is important to note that when the Nova Scotia Salary differential went from $6,000 to $10,000 for Chiefs and from $3,000 to $5,000 for Associate chiefs, the figure for Chiefs represented an 8% differential and the figure for Associate Chiefs represented a 4% differential in relation to salaries of puisne judges. With the fixed amounts of $10,000 and $5,000 respectively in 2004, these represent differentials of 6.1% and 3.1% of the current salaries of puisne judges - a relative reduction of 25%. The Association argues that the differential should be set at the federal rate of approximately 10% of a puisne judges salary, so that both Chief Judges and Associate Chief Judge would receive a salary of 110% of a puisne judge. The Association notes that the move to calculation of differentials on a percentage basis is supported by the Canadian Council of Chief Judges. The Association argues that this is a fair way to establish a differential which reflects the additional work done by Nova Scotian Chief and Association Chief judges, particularly given the fact that Nova Scotian Chiefs and Associates maintain an active role as sitting judges, unlike the situation of administrative judges in some of the larger Canadian jurisdictions.

45. The Government urged the Tribunal not to adopt a method of calculating salary differentials for Chiefs and Associate Chief on the basis of a percentage. This, argued the Government, would go beyond merely recognising the difference in workloads between puisne and administrative judges, and would inappropriately be inflated by the "escalating salaries which are recommended by the Tribunal". The Government argues that there is no principled basis for a percentage salary differential, and that the Tribunal ought not to recognise the proposition. The Government asserts that a fixed differential recognises differential duties or workloads in a principled way, and that such a system ought to be maintained. The Government

notes that only four provinces have adopted the percentage approach (British Columbia, North West Territories, Ontario and Newfoundland) while the other seven provinces/territories have fixed amounts. The Government stresses that three provinces (Saskatchewan, Manitoba and New Brunswick) have $10,000 and $5,000 differentials like Nova Scotia and that the Yukon and Prince Edward Island have lower differentials than does Nova Scotia for its Chief Judges. Even a "wealthy" province like Alberta, says the Government, only has a $15,000 differential for its Chief Judge and $7,500 for its Associate Chief Judge.

46. The Government is clear, however, in recognising the increased burden on the Associate Chief Judge of supervising and directing the P.J.P.s. Therefore, the Government proposes an increase of $3,500 ". . . to the Judge assigned to the supervision and direction of the presiding Justices of the Peace (currently the Associate Chief Judge of the Provincial Court)". This would provide the current Associate chief Judge with a salary differential of $8,500. However, the implication seems to be that any judge could be assigned the duty of supervising and directing P.J.P.s.

47. The Tribunal has concluded that calculating the differential for Chiefs and the Associate Chief Judge in terms of a percentage is most appropriate. We cannot agree with the Government's suggestion that a fixed differential represents a "principled" approach whereas a percentage does not. In fact, we would conclude that the reverse is true. As administrative tasks become more complex and time consuming, and compete for time with the judges's obligations as a sitting judge, it seems inappropriate to see compensation for such important duties shrink as a proportion of the overall compensation package. A percentage approach seems the most rational response to dealing with the matter. Setting an appropriate percentage, however, is a

matter of judgement. Moreover, this judgement must be exercised, as the Government recognised, by reference to the factors in section 21E(3) of the *Provincial Court Act*.

48. The Association's assessment may be correct that the current salary differentials did not attract large numbers of applicants for the Chief Judge's positions when they recently came open. The information reviewed by the Tribunal demonstrates that the most recent developments in the roles of Chief and Associate Judges is pushing them in unique ways which go well beyond the traditional role of scheduling and merely assigning judges to available court rooms at appropriate times. Reasonable compensation for three such judges, to reflect their particular administrative duties, is well within the means of the Province given the overall state of the Provincial economy as we understand it. Comparative information from across the country provides information by which to adjust Nova Scotian salary differentials in ways which comport with the situation in appropriate comparator jurisdictions. We do not believe that the duties of Nova Scotian provincial administrative judges warrant the 10% and higher percentage figures one has seen in British Columbia, Alberta, Ontario, Quebec and the federal jurisdiction. On the other hand, the smaller percentages found in relation to Prince Edward Island, where there are only three judges in total - and only two whose activities need "direction and supervision" - would not seem analogous to the more proactive and complicated judicial administrative structures which have arisen in this Province.

49. Having regard to the relevant factors in section 21E(3), the Tribunal has concluded that a percentage differential of 8% for the two Chief Judges and 5% for the Associate Chief of the Provincial Court are appropriate. These figures are in the ranges reflected by the percentages represented by the fixed amounts when they were introduced and adjusted at times in the past by

tribunals which put their minds to the question. We conclude that the Chief Judge's overall responsibilities warrant a greater salary differential than that proposed for the Associate Chief. However, on the assumption that the Associate Chiefs will likely continue to be assigned responsibility for P.J.P.s, we note that the 5% we recommend closely approximates the Government's proposed $5,000 plus $3,500, when calculated in relation to the base salary for puisne judges which we recommend ($172,00 x 5% = $8,600).

Recommendation 2 - Salary Differentials for Chiefs and Associate Chief

The Tribunal recommends that salary differentials for Chief Judges and the Associate Chief Judge be as follows:

(a) The Chief Judges of the Provincial and Family courts should receive a salary which is 108% of that of a puisne judge; and

(b) The Associate Chief Judge should receive a salary of 105% of that of a puisne judge.

(B) Red Circling of Chief and Associate Chiefs' Salaries

50. The Chief Judges and Associate Chief Judge made a submission in favour of "red circling" their salaries in the event that they resign from their position to return to the ranks of the puisne judges, or are not reappointed to the position by the Governor-in-Council at the expiration of a fixed term appointment. The proposal is that an administrative judge who receives the salary differential would keep the differential upon returning to be a puisne judge until the usual process of increments for puisne judges would equal or exceed the differential. At that time the judge in question would simply continue in the normal salary structure for puisne judges. The Association took no position on this question. The Government opposed the red circling proposal.

51. The Chief and Associate Chief Judges argued with some force that there are both principled and pragmatic reasons for adopting the red circling proposal. At the level of principle, there were three arguments advanced. Firstly, in relation to judicial independence, the current situation, where these judicial administrative positions are offered to candidates by the Governor-in-Council for fixed 5 year but renewable terms, leaves open the possibility, or appearance, that an administrative judge might curry favour with the Government, to the detriment of hte administration of justice, in an effort to secure reappointment and avoid the negative economic consequences of a non-renewal in the position. Conversely, independence could be at issue in the current process, which allows for consultation with a candidate's judicial colleagues, where an incumbent or candidate might be seen to favour fellow judges rather than the interests of the administration of justice, in order to garner support for a reappointment. Red circling, it is argued, would reduce apprehension of personal bias in decision making by the administrative judges because of the elimination of the financial repercussions of a sudden drop in pay.

52. The second argument based on "principle" is that fixed terms of office, and a sudden loss of salary differential at the end of the term, may create an incentive for incumbents to stay in office until the bitter end, even though they may have health issues or have lost their enthusiasm for the administrative headaches of the job. Red circling, it is said, would more easily enable an incumbent to step aside in the public interest, unencumbered by any reluctance related to immediate financial loss.

53. The third argument is related to recruitment. The roles of Chief and Associate Chief Justice are seen to be onerous and, in some measure, uninviting. The administrative judges

argued that the prospect of the sudden loss of even the "modest" salary differential currently may reduce recruitment of excellent candidates for these positions among cautious individuals, who would prefer not to put themselves out on an economic limb which could be sawed-off precipitously.

54. The pragmatic arguments are relatively straightforward. The most important relates to cost. It was argued that red circling is likely to be of short duration, since the catch-up of puisne judges salaries to red-circled ones is unlikely to be a lengthy process. Since there are only a maximum of three red circled positions, and the relative cost of the red circling would diminish each year, the exercise is one which would not unduly burden the taxpayer and is one which the Province can afford. Another pragmatic argument relates to the fact that administrative judge appointments are most likely near the end of a judicial career, and that red circling may help bridge outgoing administrative judges to beneficial retirement arrangements.

54. The Government submitted that there was no principled basis for red circling. The Government takes the position that the higher salary of the administrative judge is a recognition of the increased workload associated with the administrative position. When the administrative judge returns to being a puisne judge, there is no longer a reason to pay the higher salary (Governmetn Submission, para. 73). The Government takes the view that the arguments about independence are really arguments about pesonal bias, and that the two have a different legal status: See *R v. Valente No. 2*, [1985] 2 S.C.R. 673 para. 18. Furthermore, says the Government, since April 1, 1999 the selection process for Chief and Associate Chief Judges has involved a Recruitment Committee chaired by the Chief Justice of Nova Scotia with representatives of the provincial judiciary, a lay person and the Provincial Judges Association - there are no

government officials on it. This Committee submits a shortlist to the Minister of Justice with precise information about each candidate. This process, says the Government, upholds the integrity of the judiciary.

55. The other jurisdictions across Canada are almost evenly split among those which do and do not provide for red circling in relation to salary differentials of former incumbents in administrative judicial positions. Six jurisdictions do not have red circling: British Columbia, New Brunswick, Prince Edward Island, Saskatchewan, Yukon and Nova Scotia. There is no red circling per se for federally appointed judges, although upon retirement a former administrative judge gets a pension based on the salary of the Chief Justice. On the other hand, there is red circling of one sort or another in Alberta, Manitoba, Newfoundland, Ontario and Quebec. In most jurisdictions which have red circling, it is only available to those judges who complete their full administrative term, which does not respond to the argument in favour of encouraging the jaded administrative judge to "get out early".

56. The Tribunal does not find the arguments in favour of red circling to be compelling. The current process of appointment and reappointment is such that fears of "currying favour" among government or judicial constituencies in order to promote reappointment is unlikely to be an attractive strategy to an incumbent in the office of Chief or Associate Chief Judge. Moreover, it is unlikely that judges tempted to think in those terms would be seen to have "the right stuff" for appointment to an administrative judicial position in the first place. Finally, the salary levels required to meet the balance of factors set out in section 21(E)(3) of the *Provincial Court Act* are such that a judge with a rational capacity to engage in sound finanacial planning (and one hopes that those without such capacity would not be appointed) would have the means and the ability

to think ahead with sufficient clarity to anticipate the consequences of the end of his or her term of office as an administrative judge. The Tribunal will not recommend the adoption of red circling, despite the best efforts of the Chief and Associate Chief Judges to convince us otherwise.

III PROFESSIONAL ALLOWANCES

57. Although there is some minor discrepancy between the information provided by the Government and the Association on the question of professonal allowances,there is clarity concerning the general picture. Most Canadian jurisdictions provide judges with professional allowances which cover such items as judicial clothing, travel to conferences, seminars, workshops, and meetings of judicial orgnaisations, membership dues and fees for judicial organisations, books, periodicals, computer software, internet access fees, and other miscellaneous items. The legislation sometimes describes these items as "reasonable incidental expenditures that the fit and proper execution of the office of judge may require". The most recent information seems to suggest that professional allowances in the jurisdictions that have them are as follows: British Columbia, $3,000.00; Alberta, $3,000.00; Saskatchewan, $3000.00; Manitoba, $1,500.00; Ontario, $2,500.00; Quebec , $4,000.00; Newfoundland, $2,500.00: Yukon, $3,000.00; and for federal judges, $5,000.00. For the most part expenditures pursuant to these allowances are to be approved by the Chief Judge, and subject to a requirment to support the expenditures by submission of receipts. In addition, it is normal that there is no carry over of unused amounts from year to year, although this is subject to limited exceptions in a few jurisdictions.

58. Nova Scotia is one of four jurisdictions (the others are New Brunswick, Prince Edward

Island and the North West Territories) which do not have a system of professional allowances administered by the Chief Judge or a judicial committee operating out of the Chief Judge's office. This is not to say, however, that the Province does not support the kinds of needs exemplified by the items covered in professional allowances in most other jurisdictions. In fact, there is a series of line items in the budget of the Nova Scotia Department of Justice from which payment is made for such items, subject to the approval of financial administrators in the Department. Moreover, the Government does provide support to provincial and regional judicial education activities by directly supporting the budgets of educational conferences. However, access to certain out of province conferences is limited by a rotating seniority list which may deny access to a certain proportion of judges at any given point in time. The budget for judge's computer equipment comes out of a separate fund.

59. The Association urged the Tribunal to recommend that provincial judges be provided with an annual professional development allowance to a maximum amount of $5,000.00. The Association advised that the conditions be such that capital items purchased be deemed property of the Province, so as to ensure continued use of them for public purposes, and also to ensure that neither the items nor the allowance are taxable in the hands of the individual judge. The Association, however, was keen to have the Tribunal ensure that this professional allowance would be "new money" and not be subtracted from Department of Justice budget items which have been used to provide equipment for judges or which have been used to give global support to judicial activities such as provincial and regional conferences. The association argues that per diem as well as full-time judges should receive 100% of whatever professional allowance is established.

60. The Government supports either maintaining the status quo or creating a professional development allowance of $2,500.00 per judge per year by converting relevant existing Department of Justice budget line items for this purpose. The Government says it would also preserve budget line items which relate to judicial/court expenditures which fall outside the normal list of "professional allowance" items. The Government provided the Tribunal with a Table which summarises current budgetary line items and recent actual expenditures in relation to what it considers the normal professional allowance items. That table reads as follows:

Department of Justice Line Items Analogous to a Judicial Professional Allowance

	2001-2002		2002-2003		2003-2004		2004-2005*	
	Actual	**Estimated**	**Actual**	**Estimated**	**Actual**	**Estimated**	**Actual**	**Estimated**
Travel - Out of Province	33449.79	40000	40923.13	40000	40942.95	40000	17996.22	37000
Court Attire	16212.75	8000	11967.71	8000	15028.9	7500	2820.63	7500
Judges' Professional Development	12964.08	16000	20347.8	1600	21540.76	16000	27561.57	16000
Membership Dues and Fees	3736.34	4000	2121.73	4000	9489.7	4000	8920.26	4000
Other (including dry cleaning and pictures	2817	4400	280	4400		4400	99.95	4400
Discretionary Grants	3000	3000	7400	3000	3000	7400	3000	7400
Total	**72179.96**	**75400**	**83040.37**	**75400**	**90002.31**	**79300**	**60398.63**	**76300**

* as at February 17, 2005

This table therefore omits such budget line items as per diem honoraria, IT Supplies, IT Software Purchases, IT Data Communication, Equipment Repairs and Purchases (excluding computers) which relate to the functioning of provincial courts and the professional capacities of provincial judges. It will be seen from the Table that the Government has allowed actual expenditures to rise above budgeted line items in relation to "professional allowance" matters in 2002/2003 and in 2003/2004, and if matters continue as they have in 2004/2005, meeting the budget line could be a near thing. The Government therefore sees itself as having been generous on judicial "professional allowance" items, within the Province's limited means, even if the budget has not been administered as a professional allowance by the courts or Chief Judges themselves.

61. With respect to per diem judges, of whom there are approximately six or seven at the moment (retired judges who work per day at 1/224th the annual salary rate of a puisne judge), the Government argues they should not be entitled to the annual professional allowance accorded to full time judges, should one be created. The Government points out that no other jurisdictions provide professional allowances to per diem judges, and that only British Columbia provides an educational allowances to per diem judges. However, the Government does state that it currently pays travel expenses at 50% of their daily rate to per diem judges who wish to attend the annual provincial judges educational conferences here in Nova Scotia. Since per diem judges are already being paid a pension and cannot be required to sit or attend conferences, the Government also argues that professional and/or educational allowances for per diem judges are "discretionary items" and fall outside the ambit of the Tribunal's jurisdiction in section 21E(1), which covers only "non-discretionary benefits", particularly given subsection 21E(1)(e).

62. At the level of principle, the Tribunal concludes that a professional allowance for full

time provincial judges, at least in relation to most items which traditionally have fallen within the scope of that term, are a non-discretionary benefit over which the Tribunal has jurisdiction under section 21E(1)(e) of the *Provincial Court Act*. Judges must have robes and other appropriate attire to fulfill their role. Judges must keep up with new developments in the law, and be provided with reasonable means to attend conferences, to buy texts and to access online legal resources etc. in order to do so. In the world in which we live, an appropriate professional allowance for judges is a necessity, not some sort of luxury, in relation to the administration of justice. Moreover, the "Department of Justice budget line approach" is not consistent with the principle of judicial independence, as has been recognised in most Canadian jurisdictions. As stated at the outset of this Report, the Supreme Court of Canada has told us that "administrative independence" is one of the hallmarks of the judicial independence required by the Constitution. Having the Government administer the budget for professional development in its entirety, does not comport with appropriate standards of administrative independence for the judiciary. On the other hand, putting the administration of a professional allowance, the amount of which has been established by an independent tribunal, in the hands of the Chief Judge or a judicial committee under his supervision, does meet the standard of judicial administrative independence.

63. While the principles discussed in the foregoing paragraph seem straightforward, trying to untie the Gordian knot of present budget arrangements is not so simple. Small jurisdictions like Nova Scotia cannot afford to run the full gamut of professional development institutions which jurisdictions like the federal government or the larger provinces can maintain. The professional development programmes of the National Judicial Institute, or the elaboration of ethical codes and model jury instructions by the Canadian Judicial Council, are the envy of the judiciaries of

many countries around the world. They receive hefty budgetary resources from the federal government. A province like Nova Scotia can ensure that its judiciary an take advantage of the conferences, workshops and other programmes established by these institutions, and others such as the Canadian Institute for the Administration of Justice (of which many Nova Scotian judges have ben prominent supporters). However, Nova Scotia cannot hope to duplicate these federal efforts. Nonetheless, a professional allowance sufficient to allow Nova Scotia judges to attend national programmes on a regular basis would seem a "must" under the circumstances. On the other hand, an annual provincial judges conference for Nova Scotia judges would also seem a necessity. Purely local aspects of justice cannot be ignored if Nova Scotians are to be well-served by an educated and up-to-date provincial judiciary.

64. The Tribunal believes that these goals can be achieved within reasonable budgetary parameters and in accordance with judicial administration independence, although it is not in a position to work out all of the details based on the information which it has received to date. Given the cost of travel, conference fees, etc., the Tribunal has concluded that a professional allowance of $3,000.00 per year for full time judges, though not for per diem judges, is appropriate. This would keep the budget at about $75,000.00, which is in the range of analogous items in the Department of Justice line budget. Moreover, the $3,000.00 figure is in line with professional allowances for judges in relevant comparator jurisdictions across the country. But it is unclear whether the line item in the foregoing table under the heading "Judge's Professional Development" includes the traditional support for provincial and regional conferences. If this is the case, then there is a problem. In order for our recommendation of an annual $3,000.00 per judge as a professional allowance to work, and enable judges to cover miscellaneous items as

well as attendance at a national conference, it would appear that Government support in the traditional way for the annual provincial judges professional development conference would have to be in addition to this $75,000.00. The Tribunal therefore makes the following recommendation with the knowledge that it may have to be "fine-tuned" in the Report of a subsequent Tribunal, or even in a reference back to this Tribunal pursuant to section 21M of the *Provincial Court Act.*

Recommendation 3 - Professional Allowances

The Tribunal recommends that as of April 1, 2005, each provincial judge is entitled to be paid, up to a maximum of $3,000.00 per year, for reasonable incidental expenditures that the fit and proper execution of the office of a judge may require, including out of province travel, judicial attire, judges professional development, membership dues and fees, and other miscellaneous items (including dry cleaning) subject to the following conditions:

(a) all items shall be approved by the Chief Judge;

(b) payment shall be made upon presentation of a statement of expenses supported by appropriate receipts;

(c) statements of expenses shall only be accepted at an appropriate date prior to the end of each fiscal year;

(d) there shall be no carry-over of any unused portion of a professional allowance from one fiscal year to the next; and

(e) over expenditures in one year may be recovered from a judge's allowance in the following year.

IV REIMBURSEMENT FOR VEHICLE EXPENSES

65. The matter of "mileage" for use of private vehicles was dealt with by the Tribunal in the last round. Rates were increased to 34 cents per kilometre for the first 20,000 kilometres and 30 cents per kilometre for every kilometre over 20,000 kilometres. These rates place Nova Scotia

third last among the jurisdictions for reimbursement of vehicle expenses after New Brunswick and 32 cents and Newfoundland at 31.5 cents. Federal judges are at 45.5 cents, and unique conditions in the north can push Yukon and Northwest Territories rates to as much as 48.5 cents and 49 cents, respectively. The Nova Scotia provincial judges' standard after the last Tribunal Report became the standard for Nova Scotian civil servants.

66. The Government and the Association agreed late in the proceedings before this Tribunal to an arrangement on vehicle expense reimbursement. The Government suggested in oral argument that there had been a "ripple effect" in relation to civil servants based on the last Tribunal recommendations. The Government and Association have agreed that the status quo, or current rates, will continue to apply for 2005. They have then agreed that, if before March 31, 2007, the civil servant rates go up, provincial judges will receive the same increase.

67. The role of this Tribunal is not simply to ratify "negotiations" between the Government and the Association. Indeed, there is dicta in Supreme Court of Canada jurisprudence to the effect that the purpose of independent salary commissions is to prevent simple "bargaining between the Government and Judges" which may not be in the public interest. This is particularly a matter of concern, of course, in any situation where a government might be tempted to make a "private deal" with a specific judge. However, the process of discussion between the Government and the Association, concerning jointly acceptable solutions to issues which meet the section 21E(3) criteria, can be helpful to the Tribunal. The Tribunal has therefore put its mind to the factors in section 23E(3) of the *Provincial Court Act* which set out the manner in which it is to calibrate the public interest in relation to non-discretionary benefits for provincial judges. The Tribunal can think of no reason why the jointly proposed solution on

reimbursement of vehicle expenses is inconsistent with the factors which it is required to consider in section 23E(3). We are therefore prepared to recommend the agreed upon solution.

Recommendation 4 - Vehicle Expense Reimbursement

The Tribunal recommends that there be no increase in the current reimbursement rates for use of judges private vehicles for travel to and from court; however, in the event that civil servant reimbursement rates increase, judges shall be entitled to an equivalent increase in their rates of reimbursement.

V VACATION ENTITLEMENT

68. Nova Scotia judges currently receive 5 weeks of vacation if they have 5 years or less of service, and 6 weeks of vacation if they have more than 5 years of service. Vacation entitlements for judges in other Canadian jurisdictions are as follows:

Sec. 96 judges	—	8 weeks
British Columbia	—	6 weeks
Alberta	—	6 weeks
Saskatchewan	—	6 weeks
Manitoba	—	6 weeks
Ontario	—	8 weeks
Quebec	—	6 weeks
New Brunswick	—	6 weeks
PEI	—	5 weeks
Newfoundland	—	7 weeks
Yukon	—	7 weeks
Northwest Territories	—	6 plus weeks (31.5 days) if less than 10 years of service; 7 weeks if between 10-20 years 8 weeks if over 20 years of service

The Association advanced the position that all Nova Scotian Provincial judges should be entitled to 6 weeks of vacation.

69. In support of its position the Association argued that there was no reason for Nova

Scotian judges to rank at the bottom of the list, along with Prince Edward Island, with respect to its "junior" judges. This situation, it argued, impacts negatively on the morale of newer appointees, and when compared with the 8 week vacation entitlement of federally appointed judges, creates a disincentive for attracting "excellent candidates" to the Provincial Bench. The Association argued that all provincial judges have similar workloads and face similar stresses related to their work, and therefore should have identical vacation entitlements. The Government did not oppose this position taken by the Association.

70. The Tribunal, under the circumstances, and in the light of the factors enumerated in section 21E(3) of the *Provincial Court Act* is willing to adopt the Association's arguments.

Recommendation 5 - Vacation Entitlement

> **The Tribunal recommends that all provincial judges be entitled to six weeks of vacation, every fiscal year, starting April 1, 2005 regardless of their years of service on the bench.**

VI PUBLIC SERVICE AWARD ELIGIBILITY (LEGAL AID)

71. The Association requests that the Tribunal recommend an amendment to the *Public Service Awards Regulations* to enable a judge to count former service in employment with the Nova Scotia Legal Aid Commission toward calculation of his or her Public Service Award in the same manner that judges who were formerly civil servants or members of the Public Prosecution Service may do. The Government opposes this submission. Some explanation is required in order to appreciate the matter at issue here.

72. Civil servants in Nova Scotia, as in some other Canadian jurisdictions, receive upon death or retirement *while in service* a lump sum payment calculated in relation to their length of service. In Nova Scotia, these payments are called Public Service Awards. These awards, in

some sense, supplement a civil servant's pension, or estate upon death, as a reward for "sticking with the public service to the bitter end". Those civil servants who resign early, or have their public service terminated, are not eligible for Public Service Awards. In Nova Scotia, Public Service Awards are calculated at one week's salary for every year of service to a maximum of 26 weeks. In other words, a civil servant with 26 years of service gets half a year's salary upon retirement, or the estate receives it upon death in service, at the salary rate payable upon death or retirement. A civil servant with less than 26 years of service receives proportionately less. Public Service Awards are non-contributory, and are paid from the Consolidated Fund. The Province budgets for Public Service Awards of its employees by making a 1% charge, bi-weekly, against the operating budget of the relevant department of Government.

73. Pursuant to section 22 of the *Provincial Court Act*, judges are deemed public servants for the purposes of the *Public Service Superannuation Act*, and are thus eligible for a Public Service Award. This, incidentally is not necessarily the case in other Canadian jurisdictions, and there are some jurisdictions where judicial public service awards are being phased out with the introduction of improved judicial pension regimes. Public Service Awards continue for provincial judges in this Province, notwithstanding recent amendments to the pension plan for judges subsequent to recommendations of the 2001-2004 Tribunal. In any event, the Public Service Awards Regulations provide, through cross-reference to the regulations under the *Civil Service act*, that unbroken service with the Department of the Attorney General, and by implication, unbroken service with the Public Prosecution Service as well, constitutes service for the purposes of the Public Service Award of a provincial judge, along with that judge's period of service on the Bench. However, service as an employee of the Nova Scotia Legal Aid

Commission does not count toward a judge's Public Service Award in accordance with these regulations.

74. The Nova Scotia Legal Aid Commission was established in 1997 through the *Legal Aid Act* to be a separate body corporate operating at arm's length from the Government. Its budget comes from both the Nova Scotia Government and from the Government of Canada. Nonetheless, all employees are members of the Nova Scotia Public Service Superannuation Plan for pension purposes. Legal aid lawyers who resign to take a position in the public service continue in the Public Service Superannuation Plan and receive a pension calculated on service both with the Legal Aid Commission and with the Government. However, employees of the Legal Aid Commission are not civil servants. Despite this fact, section 10 of the *Legal Aid Act Regulations* states:

> "Salaries and pension, health plan, group insurance, sick leave and other benefits shall be provided to employees of the Commission on the same basis and scales as these are provided in the Department of the Attorney General".

In this context, the Legal Aid Commission has established a "Long Standing Award" payable on death or retirement in employment for the Commission, which are awarded on the same terms as are public Service Awards for civil servants. The Legal Aid Commission sets aside 1% of its payroll to go into a special fund to cover the "Long Standing Award". However, this award is not portable, and does not count in calculation of the Public Service Award if a legal aid lawyer is appointed to the provincial bench.

75. The Association argues that it is unfair that prosecutors who go to the provincial bench have their time with the Attorney General's Department, or now Public Prosecution Service, counted toward their Public Service Award upon retirement or death, while legal aid lawyers

cannot count their "Long Standing Award" to which they would have been entitled had they continued with the Legal Aid Commission. The Association says this is unfair for two reasons: (a) prosecutors and legal aid lawyers should be treated equally in this regard in light of their service to the public; and (b) the Province is happy to accept contributions from legal aid lawyers to the Superannuation Fund, which will assist the Government when it comes to paying their judicial pensions, but is unwilling to count service with the Legal Aid Commission for a judges Public Service Award. In these circumstances, where a legal aid lawyer goes to the provincial bench, both the Government and the Legal Aid Commission get a windfall. The Association urges the Tribunal to recommend changes to the Public Service Award Regulations to correct what it sees as the inequitable treatment of judges in essential similar circumstances when it comes to the Public Service Award.

76. The Government objects to the Association's position on the grounds that the Legal Aid Commission is a separate entity from the civil service operating at arms length from the latter. It argues that the legal aid lawyer is in the same position as a lawyer in private practice. Each will have different pension benefits arrangements in their respective situations, and each will make a decision as to whether to accept a judicial appointment in the light of their own circumstances. The Government argues that the Association's proposal, if adopted, would exacerbate an inequity as between those who were in private practice, and those who come from the "public service", according to the Association's expanded definition of the latter. The Government argues in addition that it has not put aside moneys on a regular basis for the Public Service Awards for lawyers who are not in its employ, either those in private practice or those with legal aid. It concludes it would be inappropriate for such an unbudgeted cost to be thrust upon it.

77. The Tribunal has concluded that the Government has the better arguments in this context. Appointees to the provincial bench come to their new office from different backgrounds and will have differing forms of pension arrangements and insurance benefits. They make the choice to accept the judicial appointment with their eyes open, and in the recognition that their circumstances may differ from others who accept such appointments. It may be that the Public Service Award is an anachronism, from an era when contributory pension plans of a modern sort were not available to all government employees. However, as the Association points out, the new pension arrangements approved by the 2001-2004 Tribunal were recommended and accepted on the basis that Public Service Awards would continue - that is, on the understanding that these would not be the same for all judges. The Tribunal concludes that this situation, including the fact of treating legal aid lawyers on the same footing as judges from private practice backgrounds, does not run afoul of the Tribunal's obligation under section 21E(3)(f) of the *Provincial Court Act* to provide "fair and reasonable compensation for judges in the light of prevailing economic conditions". The Tribunal will not, on the evidence before it, recommend the changes to the Public Service Award Regulations sought by the Association.

VII EDUCATIONAL ALLOWANCE AND TRAVEL INSURANCE FOR PER DIEM JUDGES

78. The Association sought a full professional allowance for per diem judges, like that of full-time judges which, as noted above, the Tribunal declines to recommend. However, the Government recognises the importance of a degree of continuing education for per diem judges. As a fall-back position, the Association argues in favour of an educational allowance for per diem judges which would provide per diem payments for attendance at educational conferences approved by the Chief Justice at 50% of the daily rate for sitting to a maximum of 2 days per conference. The daily rate at 1/224th of a puisne judges salary was $729.19 in 2004. The Government has no problem with this submission. Where the Government and Association part ways is over whether the proposed per diem arrangement applies to "in-province" or "out of province" conferences. What is at issue here appears, in fact, to be reimbursement for travel. The Government currently, and quite correctly, pays both the per diem and reimburses travel at current mileage rates for per diem judges who are presiding in courtrooms in the Province other than in the community where they live. The Association seeks payment at 50% of the daily rate for conference attendance whether in or out of the Province. The Government, apparently out of a fear that this could entail payment of out of Province travel costs, seeks to limit the per diem payments to two annual conferences of a maximum of 2 days each which are held within the Province. In this context, the Government appears to be happy to pay the mileage rate to the per diem judge who attends a conference within the Province, but believes it cannot afford to pay travel costs to a national conference.

79. There is surely a simple compromise here. The retired judge, who is already receiving a pension in any event, should receive a 2 day maximum per diem at 50% of the daily rate for an

educational conference and also receive travel expenses to the maximum mileage rate that any provincial judge might receive for an in Province conference. This way a per diem judge could travel by car with reimbursement for in Province and regional conferences to the maximum, and if he or she wished to spend the per diem rate $729.00 plus mileage, or its equivalent, to buy a seat sale air ticket to attend a national conference (and stay with friends or family, or pay for his own accommodation etc.) this could be done. While this would not be full reimbursement to per diem judges for national educational conference travel, it would be a way to subsidise the keen per diem judge, and encourage continuing judicial education through major national conferences. The Tribunal therefore recommends such a solution.

Recommendation 6 - Per Diem Judges' Educational Allowance

> **The Tribunal recommends that an educational allowance be available to per diem judges attending a maximum of two, two-day conferences per year, approved in advance by the Chief Judge, to be calculated in the following manner"**
>
> **(a) Attendance at the conference will be paid at the rate of 50% of the relevant daily sitting rate for a maximum, of 2 days per conference; and**
>
> **(b) Travel will be reimbursed to the maximum kilometre reimbursement rate that a judge could receive for travel to an educational conference held within the Province.**

80. There was added to the concerns for per diem judges, the matter of travel insurance for per diem judges travelling to or from judicial assignments, whether presiding in court or attending educational conferences. The Association argued that travel insurance for per diem judges was appropriate. It appears from the Government submissions that the current insurer can add per diem judge travel insurance to the current civil service insurance policy which covers judicial travel for full time judges. The Government would like to see this occur, but because of

section 21E(1)(d) of the *Provincial Court Act* covering life insurance, properly notes that this change should only be done on recommendation of the Tribunal. This the Tribunal is pleased to do.

Recommendation 7 - Travel Insurance for Per Diem Judges

> **The Tribunal recommends that travel insurance be obtained for per diem judges involved in fulfilling their judicial obligations, whether this be presiding in courtrooms, attending meetings, or attending judicial conferences.**

VII Health and Dental Plan Amendments

81. Through correspondence dated June 21, 2005 and July 7, 2005, counsel for the Government alerted the Tribunal that a new Health and Dental Plan was being proposed for provincial judges. By correspondence dated July 8, 2005, counsel for the Association indicated the Association's concurrence with the new plan, with a proposed effective date of July 7, 2005. Both the Association and the Government argued that the matter should be dealt with on the basis of the Government's written submissions. The Government, however, requested that the Tribunal give the Government an opportunity to make further submissions, based on new cost estimates, if the Tribunal chose to recommend changes in the plan rather than recommending adoption of the plan in its entirety. Given the Tribunal's positive view of the plan when taken in its entirety, that latter course of action will not be necessary.

82. Provincial Court and Family Court Judges have most recently been covered under a contributory Health and Dental Plan negotiated between the Nova Scotia Government and General Employees Union (NSGEU) and the Civil Service Commission. This plan was negotiated to cover for civil servants, but extended to cover other public servants and

government employees. That plan is administered by Medavie Blue Cross in association with Atlantic Blue Cross Care, and is jointly funded by employees (including the judges) (35%) and "the Province" (65%). A new plan, in fact consisting of amendments to the old plan, was negotiated between the NSGEU and the Government and came into effect on July 1, 2005. By Order-in-Council 2005-243, the Plan was also extended to give coverage beyond civil servants to other provincial employees, and to members of the Legislature. A copy of the Brochure entitled *Health and Dental Program: Province of Nova Scotia Consolidated Health and Dental Plan* which set out the elements of the old plan is attached to this Report as Appendix A. A certified copy of Order-in-Council 2005-243, dated July 8, 2005 and its Schedule A setting out Amendments to the Consolidated Health and Dental Plans, is attached to this Report as Appendix B. In the absence of a formal consolidation, these two documents together represent the New Plan for Health and Dental Benefits being proposed to the Tribunal by the Government with the agreement of the Association.

83. Under section 21E(1)(d) of the *Provincial Court Act*, this Tribunal is required to inquire into and report on matters, including ". . . health and dental benefits for judges of the Provincial Court and the Family Court and the respective contributions of the Province and the judges for such benefits". The Tribunal has had the opportunity to review the "new plan", and concludes that it meets the concerns enumerated in the factors listed in section 21E(3) of the *Act*. We are therefore pleased to recommend that the Government implement the Health and Dental Benefits Plan identified in Appendices A and B as applying to judges of the Provincial Court and the Family Court.

Recommendation 8 - Health and Dental Plan

The Tribunal recommends that the Health and Dental Plan identified and described in Appendices A and B of this Report be adopted for the judges of Provincial and Family Courts with an effective date as of July 1, 2005.

CONCLUSION AND SUMMARY OF RECOMMENDATIONS

84. Perhaps it goes without saying, but it may, in the interest of greater certainty, be prudent to state, and indeed formally recommend, that all current terms and conditions of employment of Provincial and Family Court Judges not altered by the current report, but rather resulting from the 2001-2004 Tribunal and previous Tribunals established under the *Provincial Court Act*, be continued in effect. All recommendations of this Report, of course, shall take effect as of April 1, 2005 unless another date is provided for in the recommendation.

Recommendation 9 - General

The Tribunal recommends that

(a) All matters referred to in section 21E(1) of the *Provincial Court Act* not referred to in this Report shall be governed by current terms and conditions of employment for Provincial and Family Court judges as recommended by the 2001-2004 Tribunal or previous Tribunals where applicable; and

(b) All recommendations made in this Report shall have an effective date as of April 1, 2005 unless otherwise specified.

85. A summary of the recommendations in this Report is as follows:

Recommendation 1 - Salaries

The Tribunal recommends that provincial judicial salaries for the 2005-2007 period to be as follows:

(a) commencing April 1, 2005, the sum of $172,000.00;
(b) commencing April 1, 2006, the sum of $176,300.00; and
(c) commencing April 1, 2007, the sum of $180,708.00

Recommendation 2 - Salary Differentials for Chiefs and Associate Chief

The Tribunal recommends that salary differentials for Chief Judges and the Associate Chief Judge be as follows:

(a) The Chief Judges of the Provincial and Family courts should receive a salary which is 108% of that of a puisne judge; and
(b) The Associate Chief Judge should receive a salary of 105% of that of a puisne judge

Recommendation 3 - Professional Allowances

The Tribunal recommends that as of April 1, 2005, each provincial judge is entitled to be paid, up to a maximum of $3,000.00 per year, for reasonable incidental expenditures that the fit and proper execution of the office of a judge may require, including out of province travel, judicial attire, judges professional development, membership dues and fees, and other miscellaneous items (including dry cleaning) subject to the following conditions:

(a) all items shall be approved by the Chief Judge;
(b) payment shall be made upon presentation of a statement of expenses supported by appropriate receipts;
(c) statements of expenses shall only be accepted at an appropriate date prior to the end of each fiscal year;
(d) there shall be no carry-over of any unused portion of a professional allowance from one fiscal year to the next; and
(e) over expenditures in one year may be recovered from a judge's allowance in the following year.

Recommendation 4 - Vehicle Expense Reimbursement

The Tribunal recommends that there be no increase in the current reimbursement rates for use of judges private vehicles for travel to and from court; however, in the event that civil servant reimbursement rates increase, judges shall be entitled to an equivalent increase in their rates of reimbursement.

Recommendation 5 - Vacation Entitlement

The Tribunal recommends that all provincial judges be entitled to six weeks of vacation, every fiscal year, starting April 1, 2005 regardless of their years of service on the bench.

Recommendation 6 - Per Diem Judges' Educational Allowance

The Tribunal recommends that an educational allowance be available to per diem judges attending a maximum of two, two-day conferences per year, approved in advance by the Chief Judge, to be calculated in the following manner"

(a) Attendance at the conference will be paid at the rate of 50% of the relevant daily sitting rate for a maximum, of 2 days per conference; and

(b) Travel will be reimbursed to the maximum kilometre reimbursement rate that a judge could receive for travel to an educational conference held within the Province.

Recommendation 7 - Travel Insurance for Per Diem Judges

The Tribunal recommends that travel insurance be obtained for per diem judges involved in fulfilling their judicial obligations, whether this be presiding in courtrooms, attending meetings, or attending judicial conferences.

Recommendation 8 - Health and Dental Plan

The Tribunal recommends that the Health and Dental Plan identified and described in Appendices A and B of this Report be adopted for the judges of Provincial and Family Courts with an effective date as of July 1, 2005.

Recommendation 9 - General

The Tribunal recommends that
(a) All matters referred to in section 21E(1) of the *Provincial Court Act* not referred to in this Report shall be governed by current terms and conditions of employment for Provincial and Family Court judges as recommended by the 2001-2004 Tribunal or previous Tribunals where applicable; and

(b) All recommendations made in this Report shall have an effective date as of April 1, 2005 unless otherwise specified.

The members of the Tribunal are pleased to have been able to reach a consensus on the foregoing recommendations, all of which are hereby respectfully submitted to the Honourable Michael Baker, Q.C., Minister of Justice pursuant to sections 21A through 21N of the *Provincial Court Act*. Once again we are delighted to report that the deliberations of the Tribunal were made

easier by the professional and cooperative approach taken by counsel for the Government and for the Association in amassing and sorting through the voluminous amount of information which the Tribunal had to consider in reaching its recommendations. The Tribunal was also pleased to consider the submissions of other parties who also took the time to reflect upon and present their views on the important issues falling within the Tribunal's mandate.

Dated at Halifax Regional Municipality, this 12th day of September, 2005.

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Professor Bruce P. Archibald, Q.C.
(Chair)

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Ronald A. Pink, Q.C.
(Judge's Association Nominee)

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Terry L. Roane, Q.C.
(Minister's Nominee)